COLM A. MORAN (Cal. Bar No. 202685)
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
Telephone: (310) 785-4600
Facsimile: (310) 785-4601
colm.moran@hoganlovells.com

Attorneys for Respondent
JAGUAR LAND ROVER NORTH AMERICA, LLC

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of CALIFORNIA NEW CAR DEALERS ASSOCIATION Protestant, v. JAGUAR LAND ROVER NORTH AMERICA, LLC, Respondent.	**Protest No. PR-2463-16** **RESPONDENT JAGUAR LAND ROVER NORTH AMERICA, LLC'S POST HEARING REPLY BRIEF**

I. INTRODUCTION

The California New Car Dealers Association (the "Association") filed the protest in this matter against Jaguar Land Rover North America, LLC ("JLRNA") challenging the legality of JLRNA's Amended Export Policy (the "Policy"). Under Vehicle Code § 3085, the Association has the burden to prove that the Policy violates Vehicle Code § 11713.3(y). The Association has not carried its burden of proof with respect to its substantive challenges to the Policy.

In its Opening Brief, the Association argues that the Policy violates § 11713.3(y)(1) because the Policy allows JLRNA to audit more than known exported vehicles when a dealer is selected for an audit and because, according to the Association, the Policy's use of the phrase "adequate level of due diligence" sets a standard lower that the statutory requirement that a knew or reasonably should have known that a vehicle would be exported. The Association's position, however, ignores and fails to account for the interplay between Vehicle Code § 11713.3(y)(1) and Vehicle Code § 3065.1(g)(1). Section 3065.1(g)(1) permits JLRNA to conduct audits of dealer incentive records on a reasonable basis, and for period of nine months after a claim is paid or credit issued, so long as the dealer is not selected for an audit and the audit is not conducted in a punitive, retaliatory, or unfairly discriminatory manner. The legislature simply could not have intended that JLRNA's exercise of its statutory audit rights under § 3065.1(g)(1) would place it violation of § 11713.3(y)(1). The Association also ignores the undisputed evidence that JLRNA will not find a dealer in violation of Policy unless it uncovers evidence that the dealer knew or reasonably should have known that a particular vehicle would be exported from the United States

The Association also alleges that the "Retailer Due Diligence and Best Practices" (the "Best Practices") and "Indicators of Potential Export or Broker Behavior" (the "Red Flags"), which are attached to the Policy, violate § 11713.3(y)(2). Specifically, the Association identifies a handful items (e.g., the suggestions that dealers search the Known Exporter List that is provided by JLRNA and research and their customers online via publicly available information) on the Best Practices and Red Flags that, according to the Association, act as "proxies" for discriminatory treatment. The Association, however, has introduced no evidence in support of its position Indeed, the Association's expert witness, Alan Skobin, who was critical of the practical

application of the Best Practices and Red Flags offered no testimony that the Best Practices or Red Flags implicate any characteristics prohibited by Civil Code § 51.

JLRNA submits that the Policy does not violate Vehicle Code §§ 11713.3(y)(1) and (y)(2) and respectfully requests a ruling that the Association has not carried its burden of proof regarding JLRNA's alleged violation of those subsections.

II. ARGUMENT

A. The Audit Provisions Of The Policy Do Not Violate Section 11713.3(y)(1)

The Association argues that the Policy violates § 11713.3(y)(1) because: (1) "the Policy permits JLRNA to perform or threaten to perform a broad Step 2 audit of dealer records for *all* incentive programs, not just for exports… regardless of the dealer's knowledge or constructive knowledge" (Opening Brief at 4); and (2) the Policy's use of the phrase "adequate level of due diligence" "imposes a greater burden on a dealer than the statute's knowledge requirement" (Opening Brief at 11). As is described in more detail below, both of the Association's arguments are meritless.

The Association's first argument, that the audit referenced in the Policy "itself constitutes an 'adverse action'" (Opening Brief at 4), ignores both § 3065.1(g)(1) and the facts the Association itself admits in its Opening Brief. While the Association barely devotes one sentence in its Opening Brief to § 3065.1(g)(1), that section is central to the determination of this case given the Association's argument that the audit referenced in the Policy is itself a violation of § 11713.3(y)(1). Vehicle Code § 3065.1(g)(1) permits JLRNA to conduct audits of dealer incentive records on a reasonable basis, and for period of nine months after a claim is paid or credit issued, so long as the dealer is not selected for an audit and the audit is not being conducted in a punitive, retaliatory, or unfairly discriminatory manner. Manufacturers may also conduct at least one random audit every nine months. It is inconceivable that the legislature could have intended that JLRNA would be in violation of § 11713.3(y)(1) by performing audits that are specifically allowed under § 3065.1(g)(1). In other words, an audit that complies with § 3065.1(g)(1) cannot "itself constitute[] an 'adverse action'". (Opening Brief at 4). Any other reading of the statutes would mean that JLRNA is violating one section of the Vehicle Code (§ 11713.3(y)(1)) by

exercising its rights under another section of the Vehicle Code (§ 3065.1(g)(1)).

The evidence in this matter establishes that audits under the Policy are conducted on a reasonable basis and are not performed in a punitive, retaliatory, or unfairly discriminatory manner. See JLRNA Opening Brief, Section II.D. JLRNA, has "an objective, risk-based approach to identify and select retailers for audits." See, e.g., Ex. J-4. "Specifically, a model has been developed that measures objective criteria in order to rank retailers' potential risk level and noncompliance with" JLRNA incentive programs. Id. All JLRNA dealers are subject to the terms of the Policy and JLRNA's audit rules. Moreover, the Association itself admits that "JLRNA imposes penalties [under the Policy] only if the dealer knew or should have known of an export situation…" and that JLRNA's auditors, in fact, hold themselves to an even higher standard under which JLRNA will find a violation of the Policy only when there is an "smoking gun" in the dealer's records that the dealer knew or reasonably should have known the vehicle in question would be exported at the time of the retail sale. (Opening Brief at 16.)

To support its position, the Association claims that when JLRNA conducts an audit under the Policy, it should be limited to audits of records for vehicles it knows have been exported from the United States. Opening Brief at 12. The Association goes on to claim that "JLRNA offers no reason why the audit cannot be narrowly tailored." Opening Brief at 12. The Association's position is meritless as the undisputed facts demonstrate why JLRNA should not be required to limit audits under the Policy to vehicles it knows have been exported from the United States. Frist, § 3065.1(g)(1) limits the frequency of JLRNA's audits. JLRNA simply cannot reasonably visit a dealer repeatedly to audit their records for the same nine-month period. Indeed, at the hearing in this matter the Association's counsel acknowledged the limits placed on JLRNA's audit rights by § 3065.1(g)(1). Second, JLRNA has only one full-time sales auditor and can complete a total of only 70-75 audits each year in the United States and Canada. Third, JLRNA cannot reliably identify all vehicles that may have been sold by a particular dealer and later exported. To determine whether a dealer has violated the Policy (and to what extent, if any), therefore, JLRNA must review more than the sales transactions for vehicles it knows have been exported. See JLRNA Opening Brief, Section II.D. Nothing in § 11713.3(y)(1) prohibits JLRNA

from conducting audits in compliance with § 3065.1(g)(1) whether those audits relate to "exported VINs" or otherwise.

The Association's argument that the Policy's use of the phrase "adequate level of due diligence" is itself a violation of § 11713.3(y)(1) is similarly misplaced. According to the Association, the use of that phrase is unlawful because the Policy attaches the recommended Best Practices and Red Flags, which allegedly require dealers to take "further steps over the already burdensome ordinary steps" a dealer takes in a sales transaction. (Opening Brief at 14). Thus, according to the Association, the "'adequate level of due diligence' standard imposes a significantly great burden on dealers" than is allowed in the statute. There are several problems with the Association's argument. First, while Mr. Skobin testified that, in his opinion, dealers would feel compelled to follow the Best Practices and Red Flags, such testimony contradicts the plain terms of the Policy, which makes it clear that the Best Practices and Red Flags are merely recommendations. Second, even if the Best Practices and Red Flags were "required," the Association has introduced no evidence that those best practices are intended to be entirely distinct from a dealer's ordinary business practices in connection with a sales transaction. Indeed, the evidence establishes that JLRNA compiled the Best Practices and Red Flags with significant input from dealers to provide shared learnings of other dealers regarding ways they identify exporters in the ordinary course of business. See JLRNA Opening Brief, Section II.C. The fact that Mr. Skobin, who has no experience with high export brands like Land Rover, is critical of the Best Practices and Red Flags does nothing to contradict the fact that the Best Practices and Red Flags were largely compiled from other dealers. Id. Finally, the argument that the standard set forth in the Policy violates the statute ignores the fact that JLRNA will not find a dealer to have violated the Policy unless it uncovers a "smoking gun," which demonstrates that the dealer knew or should of known the vehicle would be exported at the time of the retail sale. (Opening Brief at 16).

B. The Policy Does Not Expressly Or Implicitly Require Dealers To Make Further Inquiries In Violation of Civil Code Section 51

The Association's argument that the Policy violates § 11713.3(y)(2) is even more tenuous than its argument that the Policy violates § 11713.3(y)(1). In particular, the Association argues that the Best Practices and Red Flags, which dealers are supposedly "implicitly" required to follow, "act as proxies for inquiry into national origin, citizenship, or immigration status in violation of the statute." (Opening Brief at 5.) The record in this case, however, establishes that the Association's position is unfounded.

First, while the Association goes to great lengths to describe the Best Practices and Red Flags as "unduly burdensome and disruptive," "unrealistic," "unheard of," and "unpleasant" (Opening Brief at 14, 15, 17), such characterizations are wholly irrelevant. Even if the Association's characterizations of the Best Practices and Red Flags were accurate, which they are not, § 11713.3(y)(2) does not provide for an inquiry into whether the Policy is, inter alia, disruptive or unpleasant. Rather, the statutory inquiry is limited to whether the Policy "expressly or implicitly requires a dealer to make further inquiries into a customer's intent, identity, or financial ability to purchase or lease a vehicle based on any of the customer's characteristics listed or defined in Section 51 of the Civil Code." Section 11713.3(y)(2). The Association has adduced no evidence – and has thus failed to carry its burden of proof – on this central issue. Tellingly, while Mr. Skobin offered various opinions in this matter, including characterizations of the Best Practices and Red Flags, he did not testify that the Best Practices and Red Flags "act as proxies for inquiry into national origin, citizenship, or immigration status." (Opening Brief at 5.)

Second, under California law, inquiries that are based on individual conduct and economic criteria are not barred under Section 51 so as long as they are reasonable and made in furtherance of a legitimate business interest (i.e., not arbitrary). See, e.g., Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 1161-1162 (1991); Hubert v. Williams, 133 Cal.App.3d Supp. 1, 3-4 (1982) (excluding certain people from a business is not prohibited by the Unruh Act if it the exclusion is reasonably based upon the individual conduct of the person who is excluded). The Association admits that export activity is "detrimental for many reasons to the dealer, the factory,

and the end consumers." (Opening Brief at 13). As such, the Policy advances a legitimate business purpose, and, thus, the Best Practices and Red Flags cannot violate § 11713.3(y)(2) unless they are arbitrary, which they are not.

In this regard, the Association describes the Best Practices and Red Flags as "enumerat[ing] 62 prophylactic practices," but goes on to only list five that supposedly implicate prohibited inquiries; namely, (1) searching the Known Exporter List; (2) "searching for the customer online via Google or Bing;" (3) searching the "customer's Linkedin or Facebook pages;" (4) searching whether the customer has connections to automotive or international businesses; and (5) determining whether the customer has a U.S. driver's license. (Opening Brief at 8). The Association does not explain how searching a list of known exporters or searching for a customer online via Facebook, LinkedIn or otherwise implicates discriminatory treatment. The Association's members would undoubtedly be alarmed if pulling up a customer's LinkedIn page were a "proxy" for inquiry into the "national origin, citizenship, or immigration status" of the customer in violation of California law. As for the suggestions that dealers review the customer's international business connections or request a copy of his or her US driver's license, the Association ignores valid business reasons for such inquiries. For example, whether a customer purchasing a vehicle targeted by exporters, in fact, runs an automotive export business would certainly be a relevant fact. And it is simply a prudent business practice to determine whether a customer who claims to be purchasing an expensive vehicle for personal use, in fact, maintains a valid driver's license to drive the vehicle off the dealership lot.

Finally, the Association has made no argument that the Policy "expressly" requires an inquiry into prohibited characteristics, but rather claims that the Best Practices and Red Flags "implicitly" require prohibited inquiry. (Opening Brief at 5). A determination that JLRNA has violated § 11713.3(y)(2) would expose JLRNA to criminal liability under Vehicle Code § 40000.1, which makes any violation of the Vehicle Code a crime. Exposing JLRNA to criminal liability based on a finding that it "implicitly" requires a dealer to make prohibited inquiries would violate the U.S. Constitution's Due Process Clause, which requires that person be given "fair notice" as to what conduct is subject to government sanction. FCC v. Fox Television

Stations, Inc., 132 S. Ct. 2307, 2317 (2012).

III. CONCLUSION

For each of the reasons discussed above, JLRNA respectfully submits that the Association's challenge to the Policy under Vehicle Code §§ 11713.3(y)(1) and (y)(2) should be rejected.

Date: April 3, 2017

HOGAN LOVELLS US LLP

By: 

Colm A. Moran
Attorneys for Respondent
JAGUAR LAND ROVER NORTH AMERICA, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to this action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067.

On April 3, 2017, I caused the foregoing document described as: **RESPONDENT JAGUAR LAND ROVER NORTH AMERICA, LLC'S POST HEARING REPLY BRIEF** to be served on the interested parties in this action as follows:

Halbert B. Rasmussen
Arent Fox LLP
555 West Fifth Street
48th Floor
Los Angeles, CA 90013
213-629-7400
E-mail: halbert.rasmussen@arentfox.com

New Motor Vehicle Board
1507 – 21st Street, Suite 330
Sacramento, CA 95811
916-445-1888
E-mail: nmvb@nmvb.ca.gov

[X] **BY MAIL.** I sealed said envelope and placed it for collection and mailing following ordinary business practices.

[X] **BY E-MAIL**. I served such document(s) in PDF format to the e-mail address(es) indicated above following ordinary business practices.

[X] **(State)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 3, 2017,** at Los Angeles, California.

Colm A. Moran
Printed Name

Signature